Mr. Hatchard cited *Pointon v. Hill*[1] at p. 306 for a ruling that, though soliciting subscriptions for a hospital might amount to begging, yet it was not punishable under the Vagrancy Act and that as the Court could use its discretion in such cases to say whether the act though covered by the definition was not within the mischief of the law, so here the Magistrate had used his discretion to say that firing a pistol in the circumstances in which Mr. Thorburn fired did not come within the mischief described by the word 'disorderly' in sec. 6 (c) Emergency Regulations, 1948.

On consideration I do not think there is any weight in these arguments. It is clear from the grounds of appeal that the appeal was based on law. Was what the Magistrate held the accused had done 'acting in a disorderly manner' or not? It would have been better to state that the Magistrate was wrong in law in his finding, but the issue was clear and the respondent could not have been misled by the wording in any way. Nor can I attach any weight to the contention that to decide whether certain acts are disorderly conduct or not is a finding of fact. It is actually a finding of law; the fact found in such a case is that the acts were done; the law declared is that they were disorderly conduct. It is also completely settled law by many cases that it is the duty of a Court of Appeal to reverse a finding of fact if it is patently wrong and erroneous and there is no room for doubt about it. Clearly in this case the facts were never in doubt or even contested and all that I sitting in appeal must decide is whether the Magistrate applied the right law to those facts. It is clear he could not do so as admittedly he did not know what 'disorderly' implied. The case of *Pointon v. Hill* actually was decided on the fact that the Vagrancy Act was aimed at begging as a mode of life and not against a specific soliciting for alms for a specific purpose not again to be restored to. In the case under appeal the act done in a disorderly manner is not specified and it is for the Court to decide if it is disorderly or not.

On the whole case I hold that the Magistrate was wrong in finding that Mr. Thorburn did not act in a disorderly manner. The acts committed by him are admitted, the surroundings in which they were done are proved to be those in which men's minds would be easily affected by any abnormal action, and the acts were such as in themselves would tend to startle anyone who happened to be within earshot.

I allow the appeal and reverse the decision of the Magistrate and find Mr. Thorburn guilty of the offence charged against him.

I take into consideration that he was under severe strain at the time and had for a long time been living under such strain which was greater that night because his wife was with him in the car, and that he considered he had grounds for legitimate anger over the failure of his escort, and for the moment allowed his anger to overrule his good sense and led him into a childish display of temper. I have however to remember that other people, not least the guards on his estate, were in a state of nervous strain and likely to be very apprehensive of a sudden shot in the night, and that the responsibility lay on Mr. Thorburn as Manager and Officer in charge of the Special Constables to be able to stand up under his greater strain. I also remind myself that no actual harm was done or intended and that Mr. Thorburn even in his outburst of rage took care to fire upwards into an uninhabited area. There was no wanton indiscriminate shooting.

Taking all circumstances into consideration I consider that a fine would be adequate in this case and I sentence Mr. Thorburn to a fine of $200.00 or two months simple imprisonment.

*Appeal Allowed.*

## PUBLIC PROSECUTOR v. HENG YOU NANG.

[App. Crim. Juris. (Spenser-Wilkinson J.)
November 19, 1949]

[Selangor — Criminal Appeal from Sessions Court
No. 39 of 1949]

*Criminal Procedure Code Ss. 278 and 318 — Whether judgment in a criminal matter can be altered after it has been pronounced and signed — Meaning of export — Customs Enactment (Cap. 5 of 1936).*

In this case the Public Prosecutor had appealed against the acquittal of the respondent on charges connected with the alleged importation of certain goods by the respondent. This appeal was dismissed. Subsequently the Deputy Public Prosecutor applied by Motion that the Court should hear further arguments and review its judgment.

**Held,** that once a judgment in a criminal matter has been pronounced and signed it cannot be altered and that the Court had therefore no power to vary its decision in this case.

*Cases referred to:—*

(1) *Public Prosecutor v. Lee Tuah Suah* (1948) M.L.J. 55.

(2) *In re Gibbons* 14 Cal. 42.

(3) *Goh Ah San and 2 others v. The King* (1938) M.L.J. 95.

MOTION.

*H. Shepherd* for the Applicant.

*W. L. Wrigglesworth* for the Respondent.

**Spenser-Wilkinson, J.** : — This was an application by way of motion by the Deputy Public Prosecutor that the Court should hear further arguments in Criminal Appeal No. 39 of 1949 and review its judgment therein. The appeal in question, which was heard before me on the 17th October was against the acquittal of Heng You Nang by the Sessions Court upon certain charges under the Customs Enactment. At the conclusion of the Deputy Public Prosecutor's argument I dismissed the appeal upon grounds which I now proceed to set out.

The accused was charged in the Sessions Court as follows :—

I. That you being Nakhoda of local craft No. 15 did on 26.5.49 at about 5 a.m. at Pengkalan Baka Batu, Sepang, make a declaration for the consideration of an officer of Customs, that is to say, a declaration that you had no cargo on board the said local craft, the same declaration being untrue or incorrect, thereby committing an offence under section 113 (i) (b) of the Customs Enactment Cap. 5 of 1936, and punishable thereunder.

II. That you Heng You Nang did on 27.5.49 at about 5 a.m. at the mouth of Sepang River, Sepang export goods, to wit 110 bags of flour and 10 cartons of green peas, in contravention of the provisions of the Prohibition of Exports Order 1949, thereby committing an offence punishable under section 117 (i) of the Customs Enactment Cap. 5 of 1936.

Alternatively:

III. That you did on 27.5.49 at about 5 a.m. at the mouth of Sepang River, Sepang attempt to export goods, to wit 110 bags of flour and 10 cartons of green peas in contravention of the provisions of the Prohibition of Exports Order 1949, thereby committing an offence punishable under section 119 of the Customs Enactment Cap. 5 of 1936.

Alternatively:

IV. That you being Nakhoda of local craft No. 15 were on 27.5.49 at about 5 a.m. at the mouth of Sepang River, Sepang, concerned in exporting prohibited goods, to wit 110 bags of flour and 10 cartons of green peas, and thereby committed an offence under section 114 (i) (a) of the Customs Enactment Cap. 5 of 1936, punishable under thereunder.

The facts were that at 5.30 p.m. on 26th May, 1949, the accused applied to the Preventive Out-door Officer at Pengkalan Baka Batu for a Port Clearance in respect of his motor tongkang. He stated that he was going out with his tongkang empty. Thereupon the officer inspected the tongkang and found that it was empty, signed a Port Clearance and handed it to the accused. The vessel then left that part of the river.

Next morning at 5 a.m. a Preventive Out-door Officer on patrol duty in the Customs Launch saw this tongkang leaving the mouth of the river. He called upon the tongkang to stop, speaking in Malay, but it did not do so. The tongkang was then chased and boarded and it was found that there were on board about 110 bags of flour, and 10 cartons of tinned provisions.

The President of the Sessions Court, at the close of the case for the prosecution, held that there was no evidence sufficient to warrant a conviction and he acquitted and discharged the accused.

Against this acquittal the Public Prosecutor appealed upon the following grounds, which, in the events that have happened, I think it necessary to set out in full :—

(i) The learned President should have called upon the Respondent for his defence in respect of each charge.

(ii) There is no provision in the Customs Enactment Cap. 5 of 1936 that the declaration referred to in section 113 must be in writing. Section 48 indicates clearly that it need not be in writing.

(iii) The learned President was wrong in not exercising his discretion under section 158 of the Criminal Procedure Code by altering the charge as to the date and time of the commission of the first offence. By omitting to do so, he caused a miscarriage of justice.

(iv) The learned President was wrong in law in not admitting the statement made by the Respondent on the 27th of May 1949.

(v) The learned President was wrong in law in not admitting the reply made by the Respondent to the Preventive Outdoor Officer (P.W. 4) to the effect that he was the Taikong and was in charge of the vessel.

(vi) The order of the learned President acquitting and discharging the Respondent was against the weight of evidence.

It will be seen that the fourth and fifth grounds of appeal concern certain statements made by the accused, one, a statement in writing made on the 27th May to the Senior Customs Officer at Port Dickson and the other a verbal statement to the Preventive Out-door Officer, both of which the President held to be inadmissible. It was contended by the appellant that these statements should have been admitted, and Mr. Wrigglesworth, who appeared for the respondent on the appeal, conceded that both were admissible. I was satisfied, however, that the failure to admit these statements could have had no effect upon the President's decision, because the substance of both statements was proved by other evidence, and their admission could not have added materially to the strength of the prosecution case. These two grounds of appeal, therefore, failed.

With regard to the second ground of appeal, it was argued that the declaration by the accused at 5.30 p.m. on the 20th May, was to the effect that he intended to leave the port of Sepang with his tongkang empty; and that from the facts it can be inferred that

he all along intended to take on board further cargo. He had, therefore, it was contended, made a false declaration as to his intention. With regard to this ground it is, perhaps, sufficient to point out that this is not what the accused was charged with. He was charged with declaring falsely that he had no cargo on board, and on the evidence this charge was bound to fail because at the time of the alleged declaration it was true. Nor would a formal amendment of the charge have remedied the position. There may be circumstances in which a declaration of intention may be proved to be false but in such circumstances the grounds of falsity should be clearly laid in the charge; moreover, I can see no evidence from which it could be inferred with any degree of certainty that accused's intention on the evening of the 26th May was not precisely what he declared it to be. If he subsequently changed his mind and decided to place some cargo on board this might constitute some other offence under the Customs Enactment but it could not make false a declaration which, when made, was true.

The third ground of appeal also failed. In the first place, as I have already pointed out, no alteration either as to date or time could have cured the defect in the charge; and secondly it is to be observed that the President invited the prosecution to frame a fresh charge under Part V of the Customs Enactment but the prosecuting officer did not elect to do so. I doubt whether section 158 imposes any duty upon a Court to alter or amend the charge. I think, rather, that it is for the prosecution to apply to the Court to exercise its power under that section. Under section 173(h), Subordinate Courts have a duty to consider the charge and amend it if necessary. Nevertheless I do not think that this section makes it incumbent on the Court to search the law for offences which an accused person *may* have committed. It is for the prosecution to decide what their real complaint against the accused is and to frame their charges or to submit amendments accordingly. No doubt, in a clear case, a President or a Magistrate ought to alter a charge to fit the proved facts; but if the prosecution is unable to reach a conclusion as to the proper charge, which appears to have been the position in this case, it is in my view quite improper to criticise the President for failing to carry out the functions of the prosecuting officer.

Under the first and sixth grounds of appeal the Deputy Public Prosecutor suggested that the definition of "export" contained in the Interpretation and General Clauses Ordinance, 1948, applied in this case, and that, therefore, the act of carrying these goods down the river towards the open sea constituted an exportation thereof. I could not accept this contention. By the terms of section 2 of that Ordinance the definitions there set out only apply unless otherwise expressly provided in the enactment to be interpreted. The Customs Proclamation expressly provides a definition of "export" and it is to that definition that we must look in deciding what the word "export" means in the Proclamation and in any subsidiary legislation made thereunder. Under that definition, which is the same as the definition in the Transfer of Powers and Interpretation Ordinance, 1946, goods must be actually taken out of the Federation — i.e. taken beyond the three mile limit — before any exportation takes place, *Public Prosecutor v. Lee Tuah Suah*[1]. So that at its highest, the case against this respondent could only have been that he had attempted to export.

During the course of the argument on the appeal in connection with the admissibility of the statements above referred to and their possible effect if admitted, counsel for the respondent stated from the Bar that he was informed that the place Bagan Si Api Api referred to in the respondent's written statement and and in the Port Clearance was in the State of Selangor. The Deputy Public Prosecutor did not dispute this nor did he ask for an adjournment to consider the question, although he did mention that his instruction had been to the effect that the place was in Sumatra. The appeal, was, therefore, argued before me upon the basis that the vessel in question had cleared from Sepang for a port within the Federation which could, presumably, be reached by a craft of this kind without proceeding beyond the limits of the territorial waters.

The question whether or not the vessel's port of destination was within the Federation could have affected only one point in the appeal — that is whether or not there was evidence before the President upon which he should have called upon the accused to enter upon his defence upon the charge of attempting to export. It is in regard to this point that the Deputy Public Prosecutor asks me to review my own decision.

The first question I have to decide is whether or not I have any power to do so. In support of the contention that this Court has power to vary its own decision in a case of this kind the Deputy Public Prosecutor relied upon section 278 of the Criminal Procedure Code and upon certain English decisions.

Section 278 reads as follows :—

> No Court, other than a Court of a Judge, having once recorded its judgment, shall alter or review the same: provided that a clerical error may be rectified at any time, and that any other mistake may be rectified at any time before the Court rises for the day.

In my opinion this section confers no jurisdiction upon the High Court and the following passage from the judgment of Petheram C.J. in the Indian case of *In re Gibbons*[2] (a decision made at the time when the Indian section 369 was very similar to our section 278) so clearly expresses my view upon the meaning of our section that I cannot do better than to set it out in full :—

> In my opinion the effect of the words 'other than a High Court' is precisely the same as if in place of them the Legislature had at the end of the section added these words 'this section does not apply to the High Court'. There is no substantive enactment in that section with reference to the High Court, and all it does is to reserve the powers which existed in the High Court before, so that they are in no degree taken away. What the powers of the High Court were before it is unnecessary to consider, but whatever they were, they were reserved and they were in the same position after this section was passed as they had been in before; and inasmuch as it is not shown to us that, before the passing of this section, any power of revision existed in the High Court, that section did not, in my opinion, create any such power, and therefore it appears that this section does not help the applicant.

I think the decision in this case lays down the correct principle — that once a judgment in a criminal matter has been pronounced and signed it cannot be altered. Section 318 of the Criminal Procedure Code which deals with appeals of this nature lays down that at the conclusion of the appeal the judge shall deliver judgment in open Court. If a written judgment is delivered it is perfected as soon as it is delivered and signed; if an oral judgment is delivered it is perfected, in my opinion, as soon as it has been pronounced and the effect thereof has been entered in the judge's note-book and signed. I do not think that the subsequent certificate to the lower Court given under section 319 of the Criminal Procedure Code forms any part of the judgment — it is merely a certificate as to what has already been decided.

A similar principle exists in English Law (see *Hailsham* Vol. IX p. 182) although there are certain exceptions to it arising out of the procedure of Assizes and Sessions. But I am not concerned with the position of a High Court Judge exercising original jurisdiction and I therefore do not think that those exceptions and the authorities cited by the Deputy Public Prosecutor assist me. I am unable to find any provision of law conferring upon a judge of the High Court in its appellate jurisdiction the power to review its own decision once given. Mr. Wrigglesworth felt it his duty to bring to my attention a local decision in the Straits Settlements in 1938. This is the case of *Goh Ah San & 2 Ors. v. The King*[3] in which McElwaine C.J. having in open Court dismissed the appeal of one appellant and allowed those of the other two subsequently, when he came to give his reasons therefor, allowed the appeal of the 1st appellant. The relevant portion from his judgment is as follows :—

> This No. 1 accused was not represented on the appeal before me, and when I dismissed his appeal, and though I had read the record, I did not appreciate the weakness of the case against him. I have had some doubts whether I am now **functus officio**, but no certificate of the result of the appeal has yet been prepared. I stated I would give my reasons for my decision, and now, having come to a conclusion favourable to an accused person I think I am justified in applying the principle in **Jones v. Williams** 41 J. P. 614 (referred to in **Rex v. Manchester Justices — Ex parte Leaver**, 53 T.L.R. 687) and in regarding myself as not **functus officio**. I therefore allow the appeal of No. 1 accused.

It is to be observed that that part of the learned Chief Justice's decision was reached without hearing any argument upon the point and there is a possibility that this decision might not have been the same had his power to act as he did been seriously contested. However that may be, I am of opinion, after carefully considering that decision that it is not an authority upon the question now before me. In that case the learned Chief Justice had announced his intention of giving reasons for his decision thereby suggesting that he had not entirely finished with the case; secondly the cause of his change of view was a reconsideration of the material contained in the record itself; and finally — and this is to my mind a vital distinction — the alteration was one in favour of the accused person.

In the present case I am asked to alter my decision upholding an acquittal and to substitute a decision adverse to the accused upon what seems to me to amount to additional material. Except for a statement of very doubtful admissibility by one witness (which amounted to an expression of opinion as to the meaning of a document before the Court) there is nothing in the record to indicate that the prosecution made any attempt to prove that the vessel in question

was bound for a foreign port. The Deputy Public Prosecutor asked me to assume that everybody in the lower Court, including the President, proceeded upon the assumption that the place, Bagan Si Api Api, referred to in the Port Clearance was in fact in Sumatra. I can see nothing in the grounds of decision to support this assumption. Indeed, the finding of the President that there was no evidence of any intention on the part of the accused to leave the territorial waters suggests to me that he was unaware of the whereabouts of the port named in the ship's clearance.

In the circumstances of the case it was vital for the prosecution to establish that the accused's tongkang was bound for a foreign port. Whether this could be established by asking the Court to take judicial notice of the geographical position of the port or should have been proved by evidence is neither here nor there. The real trouble in the appeal was that the prosecution had failed to establish a vital part of their case in the Court below and that the Deputy Public Prosecutor conducting the appeal allowed an important part of his argument to be swept away by a remark made by counsel for the respondent, which, although made in all good faith, now appears to have been mistaken. I think the reason for this was that he relied principally upon a definition of "export" which I have held has no application to the Customs Enactment.

On a careful consideration of all the authorities I have come to the conclusion that I have no power in this case to vary my decision; and in the circumstances I have referred to I think that, even had I such a power, this would not be a proper case in which to exercise it.

It is, therefore, unnecessary for me to consider the various other points argued before me on the hearing of the motion. For the above reasons the motion must be dismissed and my decision dismissing the appeal affirmed.

*Application Dismissed.*